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IN THE SUPREME COURT OF THE UNITED STATES

MIKE HATCH,
Attorney General of Minnesota
Petitioner,
v.
MINNESOTA TWINS PARTNERSHIP, et al.
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Minnesota

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF PETITION

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QUESTION PRESENTED

Does Baseball's court-created antitrust exemption shield it from liability for using its monopoly power to extract taxpayer subsidized public financing for stadiums and other favorable agreements in the location of baseball franchises?

INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE AND SUMMARY OF REASONS TO GRANT THE PETITION

The State of Florida writes independently of the other amici States because the holding of the Minnesota Supreme Court in the instant case directly conflicts with the decision of the Florida Supreme Court in Butterworth v. National League of Professional Baseball Clubs, et al, 644 So.2d 1021 (Fla. 1994), and threatens the ability of State Attorneys General to protect the public interest by investigating Baseball's[1] abuse of its monopoly power. The instant case also exemplifies the conflicts and confusion surrounding the application of Federal Baseball v. National League, 259 U.S. 200 (1922) to the modern, mega million dollar, business era of Baseball and, thus, presents an important question of federal law that has not been, but should be, settled by this Court.

The business of Baseball is no longer concerned with "local exhibitions" which were not a part of interstate commerce in 1922.[2] Nor is it concerned with a potential "flood of litigation" over the player reserve system.[3] Today, the business of Baseball

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[1] "Baseball" refers to the Respondents contained in the List of Parties set forth in the Petition at p. ii of the Petition.

[2] Federal Baseball, 259 U.S at 208.

[3] Flood v. Kuhn, 407 U.S. 258, 278-79 (1972) (quoting Radovich v. National Football League, 352 U.S. 445, 450-52 (1957)).

involves the approval and sale of hundred million dollar franchises and the securing of major television markets. Today, the business of Baseball uses its monopoly power over franchise location to extract taxpayer subsidies, in the hundreds of millions of dollars, for extravagant new stadiums, with leases that make the owners of Baseball the financial beneficiaries of the facilities.

Florida and its Attorney General have had major league experience in dealing with the new modern business era of Baseball. On seven different occasions from 1984 to 1992, investors and public officials from the Tampa/St. Petersburg area tried, but struck out in their attempts to secure a baseball franchise for the Tampa Bay area.[4] Five out of seven of these attempts were used by Baseball team owners to extract new taxpayer subsidized stadium agreements from cities with existing franchises.[5]

The last of those seven attempts occurred in 1992, when a group of Tampa area investors reached an agreement to buy the San Francisco Giants for 115 million dollars and move the team to Tampa Bay (where it would play in a stadium built entirely with taxpayer dollars at a cost of 152 million dollars). However, Baseball's other team owners refused to approve the deal and forced a sale, *for 15 million dollars less*, to a San Francisco investment group, where the team continued to lose money.[6] For the people of Tampa Bay, it seemed like "Deja vu all over again," but not quite.

Two of the investors in the jilted Tampa group filed an antitrust suit against Baseball in federal court. Baseball filed a motion to dismiss. In denying the motion to dismiss, the court

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[4] See St. Petersburg Times, March 10, 1995, at 15A, a copy of which has been lodged with the Court by the Florida Attorney General as FL Exhibit 1.

[5] Id.

[6] Id.

held that Baseball's antitrust exemption did not extend beyond the player reserve system. Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993). At the same time, Florida Attorney General Bob Butterworth commenced an investigation into possible antitrust violations by Baseball's owners and issued civil investigative demands. Baseball refused to respond to the investigative demands and claimed blanket antitrust immunity. The case reached the Florida Supreme Court, which held that Baseball's antitrust exemption was limited to the player reserve system and did not shield it from liability and investigation for violations of antitrust laws in regard to the sale and location of baseball franchises. Butterworth, 644 So. 2d at 1025. Shortly thereafter, Baseball settled the suit with the investors and awarded the Tampa Bay Devil Rays expansion franchise to Tampa/St. Petersburg.

Today the State of Florida has two baseball franchises, the Florida Marlins and the Tampa Bay Devil Rays. If its Attorney General had not gone to bat for the people of Florida and used (and fought for) his power to investigate possible antitrust violations, there might not be any baseball franchises in Florida.

REASONS FOR GRANTING THE PETITION

1. There Are Conflicts Among The Lower Courts Over The Scope And Application Of Baseball's Antitrust Exemption.

While all federal laws of national application are intended to be implemented with consistency, the Court has especially emphasized the need for uniform enforcement of the federal antitrust laws. See California v. American Stores Co., 492 U.S. 1301, 1306 (O'Connor, Circuit Justice 1989) (predicting the Court would grant petition for writ of certiorari based upon a conflict among lower courts and for, among other reasons, "the need for uniform enforcement of federal antitrust laws"); Tidewater Oil Co. v. United States, 409 U.S. 151, 155-56 (1972)(noting that

Congress enacted the Expediting Act of 1903 in an effort to expedite certain litigation of "great and general importance," withdrawing all intermediate appellate jurisdiction in Government civil antitrust cases, upon certification by a district court, in order to achieve "uniform interpretation of the antitrust law").

Even prior to the Minnesota Supreme Court's ruling in Minnesota Twins Partnership, et al. v. State by Hatch, 592 N.W. 2d 847 (Minn. 1999), the issue of the scope of Baseball's judicially created exemption from the antitrust laws did not receive uniform enforcement. *See* Petition, pp. 15-17. With the conflict between Minnesota Twins and Butterworth, there now *cannot* be uniform enforcement of antitrust law between the courts of Minnesota and Florida. As the case law now stands, the citizens of the State of Florida are entitled to greater protection under the antitrust laws than are the citizens of Minnesota.

However, even within Florida, there is a problem of inconsistent interpretation and enforcement of the antitrust laws. The state courts are bound to follow Butterworth, which limits Baseball's exemption to the reserve system. The federal courts in Florida are bound by the decision of the United States Court of Appeals for the Eleventh Circuit in Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982) (hereinafter, "Baseball Schools"). In Baseball Schools, the court dismissed the plaintiff's antitrust complaint against Baseball and held that the antitrust exemption under Flood extends to all matters which are "an integral part of the business of baseball," and specifically to issues relating to: (1) the franchise location system; and (2) monopolization of the business of professional baseball. Id., 693 F.2d at 1085-86. Thus, the State or private litigants can file an antitrust claim against Baseball in Florida's state courts and proceed to litigate the matter under Butterworth. But, any antitrust claim brought against Baseball in federal court would be subject to a successful motion to dismiss.

These conflicts result in the citizens of different states, and

within the same state, having substantially different rights in different courts and may lead to state forum shopping or wasteful procedural maneuvering in regard to removal and remand between the state and federal courts.

2. This Case Presents Important Public Interest Issues That Were Not Before The Court In Flood.

Each of the cases involving professional baseball previously reviewed by this Court involved challenges to Baseball's reserve system by either a player subject to that system, or a team which was being excluded from Baseball's league of play at least in part by that system. As a result of collective bargaining agreements between the team owners and Major League players, and the Curt Flood Act,[7] Baseball's reserve system is not the issue anymore. See Petition, p. 21.

The issue submitted to the Court for consideration today is very different from the issue considered by the Court in Federal Baseball and its progeny. This case involves Baseball's cartel coercing State and local governments, by means of group boycotts and threats of group boycotts, to pay ever increasing sums of taxpayer money to acquire and keep baseball franchises. State Attorneys General, who are responsible for protecting local governments from such anticompetitive conspiracies, are helpless to do anything about this conduct as a result of the antitrust exemption created by the Court in Federal Baseball in 1922.

Baseball's use and abuse of monopoly power cannot be denied. See State of Wisconsin v. Milwaukee Braves, Inc., 144 N.W. 1, 17-18 (Wis. 1966) (noting "the probability, if not certainty, that the operations of organized baseball are rife with

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[7] Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat. 2824 (Amending the Clayton act and *codified* at 15 U.S.C. § 27a) (reprinted at pp. 47-52 in the Petition Appendix).

violations of the Sherman Act if it were applied"). The very members of Organized Baseball, as fractious a group of cartel members as can be found, freely acknowledge in their occasional lawsuits against each other that Baseball possesses and abuses monopoly power. See Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527 (7th Cir. 1978), cert denied, 439 U.S. 876 (1978) (owner of Oakland Athletics team alleged Baseball's commissioner and other team owners conspired against the Athletics in violation of antitrust laws). More recently, a complaint concerning club trademarks and sales of baseball merchandise filed in 1997 by the New York Yankees against the other members of Baseball alleges that Baseball: engages in horizontal conspiracies to restrain competition (¶5), requires the exchange among competitors of pricing information (¶7), operates as a cartel (¶154), and restrains output (¶155).[8]

This monopoly power translates into unequal and unfair bargaining power when the Baseball cartel negotiates with local governments, resulting in cities, counties, and States having to bid artificially high prices for a product whose supply is strategically restricted by the Baseball cartel. Baseball maintains its unequal bargaining power by ensuring that the number of cities that want Major League Baseball teams exceeds supply by refusing to allow expansion franchises except under considerable political pressure. See Jibeaut, Skybox Shakedown, A.B.A.J. 68, 71 (June 1998)(describing how Baseball finally granted franchise to investors in Tampa Bay after the Florida Supreme Court issued its Butterworth decision, and a congressional committee voted to approve proposed legislation that would strip Baseball of its antitrust exemption). See also Marantz, The Merchant Of Dennis, The Sporting News 14 (July 4, 1994) (describing how Senator

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[8] New York Yankees Partnership and Adidas America, Inc. v. Major League Baseball Enterprises, Inc., et al, No. 98cv0129 (S.D.N.Y. voluntarily dismissed June 22, 1998). The Florida Attorney General has lodged with the Court a copy of the complaint as FL Exhibit 2. The complaint may also be viewed at http://www.courttv.com/library/misc/yankees.html > (visited October 4, 1999).

DeConcini voted *against* proposed bill stripping Baseball of antitrust exemption after Baseball reportedly guaranteed Arizona would receive a Major League franchise).

Florida and its local governments and taxpayers have not been singled out by Baseball. Team owners across the country have used the same tactic for their own enrichment. The Colorado and Arizona expansion teams each received a new stadium, with the public's share of construction costs amounting to $321 million in Phoenix and $155 million in Denver. See J. Quirk and R. Fort, Hardball: The Abuse of Power in Pro Team Sports, pp. 219, 222 (1999). These figures do not include the costs that States and local governments are often times required by Baseball to incur for infrastructure spending, such as improving the roads surrounding a stadium. Nor do these figures reflect the favorable leasing arrangements that teams often receive, such as the right to all or a share of proceeds from ticket sales for non-baseball events held in the stadium.

The threat of a baseball team owner to leave is especially powerful when the Commissioner of Baseball steps in and declares that the other owners *will* provide the necessary votes to approve the sale and move the team, as did Commissioner Bud Selig when he told Minnesota Governor Carlson and a delegation of legislators that "if a publicly-funded stadium was not authorized and built, the other Major League Baseball team owners would approve the Twins' move from Minnesota." Minnesota Twins, 592 N.W. 2d at 849, reprinted at Petition Appendix at 3.

The decision by a State or local government to accede to Baseball's demands for massive public subsidies to team owners should not be dismissed as local governments making ordinary political decisions. This Court recognized in the case F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), that while a group is certainly free to attempt to obtain favorable economic benefits from a local government, the group may not use boycotts or other anticompetitive means to obtain those benefits.

Id., 493 U.S. at 424-25. Local governments should be entitled to negotiate with Baseball on a level playing field. Without antitrust protection, State and local governments (and their citizen taxpayers) have no choice; they must give in to the demands of the Baseball cartel, or lose their team.

These issues were not presented to the Court in Federal Baseball, Toolson, and Flood. It is difficult to imagine that the Court intended to leave States helpless to defend their constituent citizens and political subdivisions from the kind of coercion that is alleged in the Petition. State Attorneys General have an obligation to protect their local governments and taxpayers from the kinds of unfair practices and abuse of monopoly power now engaged in by Baseball. The question now is whether the antitrust exemption given to Baseball in 1922 will prohibit the Attorneys General from doing their duty.

3. This Case Presents An Opportunity For The Court To Clarify The Scope Of Baseball's Antitrust Exemption.

The greatest problem posed by Baseball's antitrust exemption is the present uncertainty as to its application, and Congress' unwillingness or inability to define the scope of the exemption. Petition, pp. 22-25. Clearly, lower courts are confused as to the scope of the exemption (Petition, pp. 15-17), and have requested clarification from this Court. See Butterworth, 644 So.2d 1021, 1026 (Overton, J., concurring) ("The United States Supreme Court should determine whether: (1) a judicially-created exemption for baseball is still viable and, (2) if the exemption exists, whether the exemption should be applied narrowly, as interpreted in Piazza, or broadly, as interpreted by Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir.), cert denied, 439 U.S. 876 (1978). Now is the time for this question to be finally resolved...").

Florida respectfully submits the Petition should be granted,

and Baseball's antitrust narrowly construed, because: (a) developments in antitrust law since Flood ensure that Baseball's special needs will receive due consideration under the rule of reason; and (b) Baseball has no legitimate reliance interest claim in the exemption outside its reserve system.

a. Baseball's special needs will be protected under rule of reason analysis.

In each of the Baseball Trilogy cases, had the Court ruled that Baseball was subject to the antitrust laws, Baseball could have been exposed to *per se* liability for its conduct. The consequences would have been serious, but Baseball certainly would have survived, much as football, hockey, basketball, and boxing have survived without an antitrust exemption.

Today, antitrust law is much more flexible in its analysis of industries and products which require a degree of cooperation amongst competitors in order for the industry or product to exist. Under the "rule of reason" a practice will be generally upheld if the procompetitive aspects of the practice outweigh its anticompetitive aspects. National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 101 (1984). In NCAA, the Court noted that "the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." NCAA, 468 U.S. at 102. This justification for certain group conduct of an organization of competing university athletic programs sounds remarkably like the Court's justification in Flood for the preservation of Baseball's exemption: "It [the exemption] rests on a recognition and an acceptance of baseball's unique characteristics and needs." Flood, 407 U.S. at 282.

Under the Court's decision in NCAA, the rule of reason is now used to scrutinize all agreements among sports league owners except agreements among Baseball's owners. There is no defensible justification for this lone exception. The rule of reason

analysis is sufficiently flexible to evaluate baseball's need for particular practices which have anticompetitive effects.

If the Court were to grant the Petition and hold that the exemption is limited to Baseball's reserve system (Butterworth and Piazza), or does not apply to group decisions regarding the location of franchises and stadium financing agreements, Baseball would be subject to rule of reason scrutiny under the antitrust laws for its non-exempt practices. If Baseball engaged in conduct that had anticompetitive aspects, it might demonstrate to a court that the procompetitive aspects outweighed the anticompetitive aspects, and if persuasive, the practice would be upheld.

b. Baseball has no legitimate reliance interest in its antitrust exemption beyond its reserve system.

Baseball cannot seem to decide whether it has a legitimate reliance interest in its judicially created antitrust exemption. It claims it is not doing anything that violates the antitrust laws but yet it has relied upon the exemption for many years.

Thomas Ostertag, the general counsel for Major League Baseball, was asked in a recent interview: "How much does baseball's antitrust exemption affect the way that you do your job?" Mr. Ostertag responded: "That is a tricky question because baseball clearly has this exemption and wants to retain it for a number of reasons. *On the other hand, it is awfully hard to point to things that baseball does that would be a violation of the antitrust laws without the exemption.* In part, the reason that we value the exemption and don't want to see it changed is because I fear the flood of litigation would be overwhelming. We have developed for seventy-something years upon this exemption and if, all of a sudden, the rules were just changed I think that people

all over the country would view it as open season on baseball."[9]

In sum, the highest ranking lawyer for Major League Baseball first stated that Baseball has no real reliance interest in the exemption, and then asserted that Baseball wants to keep whatever exemption it has to fend off spurious lawsuits. That desire does not constitute a significant or legitimate reliance interest.

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[9] Interview by Michael A. Genova III with Thomas Ostertag, S. Cal. Sports & Ent. L. J. (visited September 9, 1999) <http://www.se-law.com/ostertag.htm> (emphasis added). The Florida Attorney General has lodged with the Court a copy of the Ostertag interview as FL Exhibit 3.

CONCLUSION

Florida respectfully submits that Minnesota's Petition for Certiorari should be granted to settle the direct conflict between the decisions of the Florida and Minnesota Supreme Courts and resolve the disagreement and confusion in other lower courts on how to interpret and apply Baseball's antitrust exemption to franchise location and stadium agreements. These are important new questions of federal law that have not been, but should be, settled by this Court in order to preserve the power of the State Attorneys General to protect the public interest under the antitrust laws of their states and this nation.

Respectfully Submitted,

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